

OLPA HEARING REPORT

NEW CENTURY, NEW PROCESS: A PREVIEW OF COMPETITIVE SOURCING FOR THE 21ST CENTURY

Hearing Before the House Committee on Government Reform

June 26, 2003

Members Present: Tom Davis (R-VA), Chairman; Henry Waxman (D-CA), Ranking; William Clay (D-MO); Jim Cooper (D-TN); JoAnne Davis (R-VA); Eleanor Holmes-Norton (D-DC); Doug Ose (R-CA); C.A. Ruppertsberger (D-MD); Christopher Shays (R-CT); John Tierney (D-MA); Christopher Van Hollen (D-MD); Diane Watson (D-CA)

Witnesses:

Panel One:

- Mr. David Walker, Comptroller General, U.S. General Accounting Office
- Ms. Angela Styles, Director, Office of Federal Procurement Policy, Office of Management and Budget
- Mr. Philip Grone, Principal Assistant Deputy Under Secretary of Defense for Installations and Environment, Department of Defense
- Mr. Scott Cameron, Deputy Assistant Secretary for Performance and Management, Department of Interior

Panel Two:

- Mr. Bobby Harnage, Sr., National President, American Federation of Government Employees
- Ms. Colleen Kelley, President, National Treasury Employees Union
- Mr. Donald D. Dilks, President, DDD Company
- Mr. Stan Soloway, President, Professional Services Council

Purpose of Hearing:

The purpose of the hearing was to examine the Administration's recently-issued revisions to OMB Circular A-76, which establishes procedures for determining whether commercial activities should be performed under contract with private industry or remain in the Federal sector.

Opening Statements:

Representative Davis provided a brief history of the circular, the rationale for its revision, and highlighted some of its changes. He stated that the ultimate objective of public-private competitions should be to pursue the best value for taxpayers. Finally, he noted that the revisions to the circular are central to the Administration's competitive sourcing initiative which is one of the priorities outlined in the President's Management Agenda.

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Representative Waxman characterized the competitive sourcing initiative as another example of how the Administration has “declared war on Federal employees.” He said that this initiative is not about efficiency and cost but about favoring companies, like Halliburton, who he noted was a large campaign contributor. He said that there have been cases where Federal employees demonstrated the ability to carry out duties at a lower cost; however, private industry won the competition. He noted the “billions of taxpayers’ dollars squandered on private companies” at the Department of Energy. Although there is a need to revise OMB Circular A-76, Representative Waxman said that agencies are being forced to conduct competitions at the expense of important program priorities. He cited an example of how the cost of running competitions at the National Park Service were so high the agency had to reduce seasonal employment. He also expressed his displeasure at the narrowing of the definition of “inherently governmental.”

Statements of Witnesses:

- Mr. Walker described the competitive sourcing principles and recommendations developed by the Commercial Activities Panel, of which he was chair, and noted that the targets set by the Administration were arbitrary and inappropriate.
- Ms. Styles updated the Committee on OMB’s competitive sourcing initiative and the revised A-76 circular.
- Mr. Grone discussed the revised A-76 circular and DOD’s plans for its use.
- Mr. Cameron described the competitive sourcing program at the Department of Interior.
- Mr. Harnage and Ms. Kelley criticized the Administrations outsourcing initiative and the revised A-76 circular while Mr. Dilks and Mr. Soloway were generally supportive of the efforts.

Panel I Discussion (specific questions in Appendix I):

Members were interested in knowing if there were existing estimates of potential agency savings as a result of competitive sourcing. Both GAO and OMB stated that their organizations did not have future cost estimates; however, it was noted that there was a 20 to 30 percent savings at DOD. Also asked was what assurances are given to Federal employees that they would not lose their jobs and how cost savings could be achieved if these employees continued to be employed by the Federal government. Ms. Styles explained that options for Federal workers who lose competitions vary among the agencies – some have more flexibility than others to retrain and reassign employees. Mr. Davis was particularly interested in the effect on Federal employee morale if they are subjected every few years to competition and how the Government’s ability to hire people into civil service would be effected.

Representative Van Hollen stated that it was his understanding that Federal employees who lost competitions did not have appeal rights. Mr. Walker explained that Federal employees did not have a right to appeal a decision to GAO; however, there is a Federal register notice asking for

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public comment on whether and under what circumstances representatives of Federal employees can appeal to GAO in certain circumstances.

Representative Shays asked about OMB's rationale for changing its competitive sourcing goals, what would happen to agencies that do not meet the goals, and if DOI and DOD would be able to meet the targets. Ms. Styles explained that the goals have not necessarily been changed and attempted to provide some background on how the goals were set and the time frame for implementation. Although Mr. Grone and Mr. Cameron stated that they would be able to meet their goals by July of 2004, Mr. Shays seemed concerned about the consequences for agencies that did not meet the goals. When Ms. Styles replied that OMB would merely "work" with the agencies to meet these targets, he seemed skeptical. Mr. Shays was also interested in the rationale for establishing a 12-month deadline to complete competitions since, historically, for DOD, it has taken 25 months.

Overall, Representative Norton was very critical of what she termed quotas for privatization and how the Administration does not give an accurate portrayal of who works for the Federal government. Ms. Styles said that OMB never had quotas and that detailed, tailored plans were developed for each agency, but Ms. Norton found this response "absolutely ingenuous." Ms. Norton also referred to a 1999 estimate that there were 5.6 million contractors and 1.9 million Federal employees and requested an update for 2003. Ms. Norton acknowledged that the contract workforce has grown throughout Democratic and Republic administrations; however, this new drive to further contract out the work of Federal employees should be substantiated by evidence from OMB that there will be improved efficiency and savings.

Panel II Discussion (specific questions in Appendix II)

The new definition of inherently governmental was not clear to Mr. Cooper and he asked the panel for clarity. Ms. Kelley stated that the revision increased the number of jobs that will be categorized as commercial and introduces a subjective gray area, where a job could be commercial or inherently governmental. Using traffic control as an example, Mr. Soloway acknowledged that some functions are inherently governmental but others, such as technical support, should be considered commercial. He added that he believed that the correct decisions could be made regarding the category in which jobs would be placed.

Mr. Ruppertsberger was interested in how small businesses would be effected by the competitive sourcing initiative. Mr. Dilks explained that the revised A-76 circular should resolve some concerns, adding that small businesses can partner with other companies for larger procurements. Mr. Soloway added that one of the ways small businesses are adversely effected is the elimination of "direct conversions" (where work currently performed by Federal employees is competed only among private sector firms).

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Mr. Tierney's questions centered around whether the Federal government would have the ability to manage the contracts, the re-competition process under the revised circular, and the effect of competitive sourcing on Federal workforce diversity. Ms. Kelley pointed out that there is no requirement for an office to monitor contracts and hold contractors accountable. Mr. Harnage confirmed that minorities and women would be negatively effected by the competitive sourcing initiative. Regarding Mr. Tierney's question on whether the revised circular should be changed to ensure that contractors as well as Federal employees are required to re-compete, Mr. Dilks clarified that contractors must re-compete since contracts have time-limited terms. Ms. Kelley pointed out that if Federal employees lose a competition to private industry, they never have an opportunity to re-compete.

When Mr. Davis asked if the revised circular was an improvement, Ms. Kelley replied in the negative. She said that her written testimony outlined numerous problems and asked the Committee to halt its implementation until these issues are remedied. Mr. Harnage agreed with Ms. Kelley and said that it was revised to favor contractors and pointed out that the "most efficient organization" (a group of Federal employees formed to develop a proposal to compete on behalf of the government) was eliminated. He added that the competitive sourcing initiative is not driven by cost savings and accountability, but by a political agenda to give money to private industry. Mr. Davis was also interested in the lack of appeal rights for Federal employees who lose a competition and how often contractors hire these employees. Mr. Soloway stated that GAO determines who can appeal a decision and that about 60 percent of displaced Federal employees work for the contractor.

Mr. Davis stated that although the Committee had the authority to legislate, he was doubtful anything could be enacted that would stop the competitive sourcing process considering the current administration. He was hopeful that the Committee may be able to influence the regulatory process; however, he wanted to get a better understanding of all the issues. Mr. Davis stated he recognized that competitive sourcing is a management tool that should be utilized, but he wanted to be fair to all.

Member Questions to Panel I

Representative Ose

- Has GAO and OMB estimated the potential dollar savings in the first year, the second year and then annually thereafter?
- (To GAO) Do you have some sense of perhaps the range of percentages that we might have in savings?
- (To GAO) What do you recommend to ensure that these agencies (NASA, HUD, DOE) can fairly implement the new A-76 circular without disadvantaging Federal employees currently performing commercial functions?

Representative Van Hollen

- (To OMB) How are we going to achieve the kind of cost savings we are talking about if no one is laid off? What kind of assurances can you provide to the Federal workforce that people aren't going to be losing jobs?
- (To GAO) Have you done any analysis that correlates savings to anticipated decline in employment with the Federal government?
- (To GAO) I am very concerned that the deck is stacked. For example, my understanding is that a private contractor who loses a bid or competition has the ability to appeal whereas the Federal group does not. Is that right?

Representative Shays

- What is OMB's rationale for changing its competitive sourcing goals? What happens to agencies that don't meet this goal?
- (To OMB) For the last several decades, the basic government policy or principle has been to rely on the private sector for needed commercial services. This principle has been in A-76 for many years. Why isn't this policy or principle included in the revised circular?
- What kind of questions have agencies had for OMB regarding the new A-76 process? How has OMB ensured that it has given consistent guidance to these agencies?
- (To GAO) The new circular requires agencies to compete an A-76 competition in 12 months (it takes the DOD, on average, 25 months), so what specific change in the new circular will assist agencies in meeting the 12 month deadline?
- (To GAO) What would be some of the risks associated with having agencies complete the competitions in 12 months as opposed to taking (25 months).

Representative Tom Davis

- (Answered by GAO, OMB and DOI) We may, in fact, be getting efficiencies over the short term, regarding the way we do some things, but do we destroy the morale and our ability to hire and retain good people if we hire them, bring them in the government and every few years put them up for grabs again just like a contractor. Is that a realistic concern, and if so, how do we address that in this context?

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Representative Norton

- (Answered by GAO and OMB) I would like to question you about the substitution of contract employees for Federal employees when the government is told that it is indeed reducing cost for government employees. Of course, the last time we heard, government pays for contracting employees the same way it pays for civil servants. Have you evidence that there have been employees from contractors who are replaced people who were bought out?
- (To OMB) When are we going to tell the public that a government employee in this day and age where there is massive privatization includes people who are contracted and people who are civil servants? Wouldn't that be the fair way to inform the public who pays the taxes for both?
- (To OMB) If you use a quota or an absolute number of any kind, you will be inclined not to judge on the basis of qualifications. I would like to have you explain to me, particularly in this anti-quota Congress, and as the Supreme Court has decried quotas for reasons that I think most people would agree, how you could justify the quotas that you now have for privatization?
- (To GAO) If a manager thinks that if he really makes the 15 percent privatization, his own rating will be better than if he makes 10 percent, he is perhaps more likely to press it?
- (To GAO) Can you provide me information, as of 2003, what is the best estimate you can give us of the contract workforce – rumor of 5.6 million is what Dr. Paul Light says, and what is the best estimate of the civilian civil service workforce (about 1.9 million).

Representative Tierney

- (To entire panel) I'm wondering if some of you might be able to talk to me about the change in definition, from the act of governing being a discretionary exercise of government authority to now propose substantial discretionary exercise and what was the reason for that change and what do you think the impact of that change will be?
- (To OMB) I look at the incident of Affiliated Computer Services case in the DOD where an error was made and by the time the error was discovered, the Federal employees were gone. In an instance like that, who is going to be able to remedy it and how to avoid other situations like that?
- (To OMB) What about the risk that we stand of not having something outsourced outside the country?

Member Questions to Panel II

Representative Cooper

- (Answered by NTEU and Professional Services Council) The inherently governmental distinction looks confusing and arbitrary and I wonder if it wouldn't be simpler just to say that you could privatize whatever any company wanted to bid on, because the standard seems to shift over time and it's hard to see a clear dividing line. Are there clear dividing lines, especially when you are talking about narrowing the standard?
- (Answered by Professional Services Council and AFGE) I am worried about the inherent disadvantages. I understand that there is an automatic 12 percent overhead rate applied to any in-house bid, at least within the DOD. That seems like an arbitrary and unfair number. Why is the 12 percent automatically the overhead rate that is applied?

Representative Ruppertsberger

- (Answered by DDD Company and Professional Services Council) The contracts from this process tend to be large dollar volume contracts, which essentially cut small businesses out of the bidding process. What is being done to ensure that small businesses won't be pushed out of the process and how can we be sure that small business percentages are built into the contracts or actually fulfilled?

Representative Tom Davis

- (Answered by NTEU and AFGE) Is the new circular better than the old circular?)
- I expressed an earlier concern that when you do this (regular competitions) on a repetitive basis, you wear down the Federal workforce who feel they don't have job stability. Both the NTEU and AFGE were included in the Commercial Activities Panel and agreed with the sourcing principles that were developed. What is the primary difference between the principles and the updated circular? Could you quickly characterize the differences?
- (Answered by DDD Company and Professional Services Council) The new circular doesn't address the issue of the standing of Federal employees to protest before the GAO or the Federal courts. What is your view on whether the Federal employees themselves should have standing to challenge A-76 determinations?
- (To Professional Services Council) How often do Federal employees that are displaced end up with the contractor after an A-76?
- (To Professional Services Council) You testified that you have concerns with Federal employee groups being exempt from having past performance used as a selection criteria in the first round of A-76 competitions. How do you measure a Federal employee's past performance? How does the government assess its own past performance?
- (To panel) Should the government have a program where contracts are periodically reassessed to see if they would be better performed by Federal employees?

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Representative Tierney

- Let me talk about best value. That seems to me the most subjective of all the aspects of this. Mr. Harnage (AFGE), Ms. Kelley (NTEU), do you have concerns about that, what are they, and how do we address them?
- (To AFGE) Could you expand on your comment about the adverse impact on diversity in the Federal workforce?
- (To DDD Company) Would you be amenable to having the A-76 changed to make sure the contractors as well as public employees were held to re-competition?

*Prepared by: Patricia Brandt Hansberger, OLPA
July 29, 2003*